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IN THE

Supreme Court of the United States

October Term 1965
No. 586

GERALD DALE HENSEL,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition For a Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

GERALD DALE HENSEL,
8746 Sunset Boulevard,
Los Angeles, Calif. 90069,
Pro Se.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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GERALD DALE HENSEL,

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STATE OF CALIFORNIA,

Respondent.

BRIEF FOR PETITIONER.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California entered on April 26, 1965.

Citations to Opinions Below.

The opinion of the District Court of Appeal of the State of California is reported at 233 A.C.A. 999 (1965). The order of the Supreme Court of California denying hearing is not officially reported, and it is set forth in the appendix (see accompanying certified record).

Jurisdiction.

The order of the Supreme Court of California denying hearing was entered on June 23, 1965. The jurisdiction of the Court is invoked pursuant to Title 28.

United States Code § 1257(3), petitioner having asserted below, and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Question Presented.

The issue presented is whether clandestine surveillance by the police of a public restroom by means of a secret spyhole is an illegal invasion of privacy; and whether the admission of evidence obtained by such surveillance is a violation of petitioner's rights under the Fourth, Fifth and Ninth Amendments to the Constitution of the United States secured to him by virtue of the Fourteenth Amendment.

Statutory and Constitutional Provisions Involved.

1. This case involves the Fourth, Fifth and Ninth Amendments to the Constitution of the United States.

2. It also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement.

All the facts are contained in the preliminary transcript [C. T. pp. 2-18].

Arthur J. Madrid testified as a witness on behalf of the people and stated that he was a police officer of the City of Los Angeles, assigned to Highland Park Vice.

That on January 9, 1963, at approximately 1:15 p.m., he and his partner arrived at Arroyo Seco Park. He then took a vantage point, overlooking the men's restroom which was reached by going up a ladder from the tool shed adjoining the restroom and looking down through a ventilation screen.

That he saw petitioner and his co-defendant near the urinal area of the restroom.

That he saw petitioner and co-defendant engage in an act of oral copulation after which he went down and effected the arrest.

That at the time he made these observations he was standing on a ladder looking down through a vent in the attic above the tool shed next to the restroom. When the officers went into the restroom to make the arrest, petitioner's penis was in his pants and Officer Madrid testified that the only time he was able to determine that there was a violation was when he was looking through the vent from the attic [C. T. p. 13].

How Federal Questions Were Raised and Decided.

At the preliminary hearing a motion was made to strike the testimony of Officer Madrid on the basis that it was unlawful search and seizure as defined by *Britt v. Superior Court,* 58 Cal. 2d 469. The motion was overruled [C. T. p. 13].

On Appeal to the District Court of Appeal, petitioner urged that the evidence against him was illegally obtained and, thus, was inadmissible. This appeal was based on the Fourth and Fifth Amendments to the Constitution of the United States and was rejected by the court. (*People v. Hensel,* 233 A.C.A. 999, 1001-1002).

On petition for hearing to the Supreme Court of California it was again argued that petitioner's rights were violated by the invasion of his privacy. Hearing was denied on June 25, 1965.

Reasons for Granting the Writ.

I.

The observations by the police officer through a spy-hole constituted a violation of Petitioner's right of privacy guaranteed by the Fourth, Fifth, and Ninth Amendments to the Constitution.

This Court has recognized a constitutional right of privacy on numerous occasions. The most recent example is found in *Griswold v. Connecticut,* .....U.S....., 14 L. ed. 2d 510, in which the Court held that the Connecticut statute making the use of contraceptives a criminal offense was invalid as an unconstitutional invasion of the right of privacy of married persons.

In giving the opinion of the Court, Mr. Justice Douglas discussed the nature of the right of privacy and the grounds upon which it is based. After discussing *NAACP v. Alabama,* 357 U.S. 449, 462, *Sweezy v. New Hampshire,* 354 U.S. 234, 249-250, 261-263, and numerous other cases, Justice Douglas stated as follows:

> "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, 267 U.S. 497, 516-522, 6 L ed 2d 989, 1003-1007, 81 S. Ct. 1752 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another

facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, 29 L ed 746, 751, 6 S Ct. 524, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life. We recently referred in Mapp v. Ohio, 367 U. S. 643, 656, 6 L ed 2d 1081, 1090, 81 S Ct. 1684, 84 ALR 2d 933, to the Fourth Amendment as creating a 'right of privacy, no less important than any other right carefully and particularly reserved to the people.' "

Griswold v. Connecticut, supra at p. 514.

Petitioner contends that the admission of the evidence obtained by spying into the restroom was in violation of his right to privacy secured under the Fourth, Fifth, and Ninth Amendments to the Constitution as described above by Mr. Justice Douglas. In Griswold, both the Court's opinion and the concurring opinions of Justices Goldberg, Brennan, and Chief Justice Warren indicate the vitality of the Ninth Amendment in its relation to privacy as a right retained by the people. Patterson, The Forgotten Ninth Amendment (1955).

It has been held that this right to privacy is a fundamental right which is included in the Fourteenth Amendment, and is therefore applicable to the States, *Mapp v. Ohio,* 367 U.S. 643, 656:

> "Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."

The constitutional right of privacy has been increasingly recognized in recent years, and it seems clear that Petitioner has a particularly valid claim for constitutional protection. The right of privacy in connection with the Fourth and Fifth Amendments was the first type of privacy acknowledged by the Court and has been the most jealously protected. Privacy has been the central concept of search and seizure since the now historic decision of *Boyd v. United States,* 116 U.S. 616:

> "The principles laid down in this opinion (by Lord Camden in Entick v. Carrington, 19 Howell's

> State Trials 1029) affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life."
>
> *Id.* at p. 630.

Rather than being eroded with time, the Boyd decision has grown in stature through the years.

> "The authority of the Boyd decision has never been impeached. Its basic principle, that the Fourth and Fifth Amendments interact to create a comprehensive right of privacy, of individual freedom, has been repeatedly approved in the decision of this Court." *Lopez v. United States,* 373 U.S. 427, 456 (dissent by Mr. Chief Justice Warren); citing, among other cases, *Bram v. United States,* 168 U.S. 532, 543, 544; *Gouled v. United States,* 255 U.S. 298, 306; *Amos v. United States,* 255 U.S. 313; *Counselman v. Hitchcock,* 142 U.S. 547, 562.

The concept of privacy in connection with the Fourth and Fifth Amendments has never been construed in a narrow manner. In *Wolf v. Colorado,* 338 U.S. 25, 27, it was said that the gist of the Fourth Amendment is "[t]he security of one's privacy against arbitrary intrusion by the police". In *Olmstead v. United States,* 277 U.S. 428, Mr. Justice Brandeis in a famous dissenting opinion explained the nature and scope of constitutionally protected privacy:

> "The protection guaranteed by the (Fourth and Fifth) Amendments is much broader in scope.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. . . ."
>
> *Id.* at p. 478.

The *Griswold* case indicates that the right of privacy is becoming increasingly important in modern society. The combination of increased population growth and modern electronic eavesdropping devices require increased protection of the privacy of every individual. *Silverman v. United States,* 365 U.S. 505; King, Electronic Surveillance and Constitutional Rights: Some Recent Developments and observations, 33 Ga. Wash. Rev. 240 (1964); Comment, Do We Have to Live with Eavesdropping: A Legislative Proposal, 38 S.C.L. Rev. No. 4 (1965).

This protection does not refer only to an individual's home or his person. In *Lanza v. New York,* 370 U.S. 139, 143, it was said that "the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection". Protected areas listed in that

decision were a business office, store, hotel room, automobile, and even an occupied cab. *Id.* at p. 388, and cases cited therein.

In the *Lanza* case the majority held that a jail was not a constitutionally protected area, but this was based on the traditional nature of prison security. Surveillance is the normal way of life in a jail with prisoners and their possessions constantly being searched and inspected. This is clearly not true of a restroom. No one expects to be spied upon when they enter a restroom whether it be public or private. It has not been traditionally a place of Government surveillance and the mind rebels at the thought of peepholes and hidden policemen in such a private place. The next step would be to replace the policeman with a television camera in the peephole or air vent which would allow constant surveillance of numerous restrooms.

The evidence gathered through spying into a restroom is offensive in another manner. Inevitably innocent and guilty alike are spied upon, and the result is a completely indiscriminate surveillance and gathering of evidence.

> "The requirements of the Fourth Amendment are not technical or unreasonably stringent; they are the bedrock rules without which there would be no effective protection of the right to personal liberty. A search for mere evidence offends the fundamental principle against self-incrimination, as Lord Camden clearly recognized; a merely exploratory search revives the evils of the general warrant, so bitterly opposed by the American Revolutionaries; and without some form of notice, police searches become intolerable intrusions into the pri-

vacy of home or office." *Lopez v. United States, supra,* at p. 464 (Dissent by Mr. Chief Justice Warren).

In California the Supreme Court has also recognized the privacy element of search and seizure. *Bielicki v. Superior Court,* 57 Cal. 2d 602, 371 P. 2d 288 (1962). In a later case the same court held that an individual is entitled to privacy in a public restroom even if the individual's behavior might have been observable by a member of the general public entering the restroom. *Britt v. Superior Court,* 58 Cal. 2d 469, 472, 374 P. 2d 817 (1962). The important fact is that the police officer did not observe as a member of the public might have, but rather from a secret hiding place *without* the knowledge of the defendant. The court rejects the argument that the police should be able to spy if the individual does not have a completely private stall in the restroom.

> "This proposed distinction is equally unsound as applied to the facts here established. The crucial fact in Bielicki was neither the manner of observation alone nor the place of commission alone, but rather the manner in which the police observed a place—and persons in that place—which is ordinarily understood to afford personal privacy to individual occupants. Of course, clandestine observations by police officers of premises devoted to common use by the general public—such as for example, the shopping areas and public hallways and elevators of the department store here involved—is not prohibited by our decision in Bielicki. (See p. 609(9) of 57 Cal.2d.) But it is equally clear that authority to maintain clandestine surveillance

of common use public places and persons therein is not the equivalent of license to surreptitiously invade the right of personal privacy of persons in private places. Man's constitutionally protected right of personal privacy not only abides with him while he is the householder within his own castle but cloaks him when as a member of the public he is temporarily occupying a room—including a toilet stall—to the extent that it is offered to the public for private, however transient, individual use."

Id. at p. 472.

Conclusion.

Wherefore, for the foregoing reasons Petitioner prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

GERALD DALE HENSEL,
Pro Se.

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Appendix to Petition for a Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

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Los Angeles, Calif. 90069,
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APPENDIX.

Opinion of the District Court of Appeal.

[Crim. No. 9582. Second Dist., Div. Four. Apr. 26, 1965.]

The People, Plaintiff and Respondent, v. Gerald Dale Hensel, Defendant and Appellant.

Appeal from a judgment (order granting probation) of the Superior Court of Los Angeles County. Lewis Drucker, Judge. Modified and affirmed.

Prosecution for violation of Pen. Code, § 288a. Judgment of conviction of disorderly conduct modified and affirmed.

Herbert E. Selwyn for Defendant and Appellant.

Stanley Mosk and Thomas C. Lynch, Attorneys General, William E. James, Assistant Attorney General, and John F. McLaren, Deputy Attorney General, for Plaintiff and Respondent.

Kingsley, J.—Defendant was charged by information with a violation of section 288a of the Penal Code (oral copulation). Jury was waived, and the matter was submitted on the transcript of the testimony taken at the preliminary examination, without additional testimony. Under circumstances hereinafter described, he was ultimately found guilty of a violation of subdivision (a) of section 647 of the Penal Code.[1] He was sentenced to

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[1]We note that the judgment as entered refers to a violation of "Section 647a." That section deals with child molestation and, by no stretch of the imagination could have been violated by any conduct alleged or proved in this case. Counsel on appeal both agree that the court meant subdivision (a) of section 647; we accept that stipulation, in part because common oral reference to these sections makes confusion easy if not inevitable. Our decision herein corrects the typographical error in the judgment.

a term of 60 days in the county jail, sentence was suspended and he was put on probation for one year. He has appealed from the order granting probation (Pen. Code, § 1237).

On appeal, he contends: (1) that the evidence against him was illegally obtained and, thus, was inadmissible; (2) that the court erred in finding him guilty of a violation of section 647, since that is not a lesser and necessarily included offense within the offense (§ 288a) with which he was charged. We conclude that neither contention is valid.

I

The sole evidence against defendant was that of the arresting officer. The officer testified that he had stationed himself where he could look through a ventilation screen into the men's toilet of a public park. While so stationed, he observed defendant and his codefendant engaged in an act of oral copulation. They were standing near a row of urinals. The rest room was approximately 20 by 15 feet, with five urinals without partitions or dividers and three toilets enclosed on three sides but without doors. The men were in plain view of anyone entering the rest room.

Defendant relies on *Bielicki v. Superior Court* (1962) 57 Cal.2d 602 [21 Cal.Rptr. 552, 371 P.2d 288], and on *Britt v. Superior Court* (1962) 58 Cal.2d 469 [24 Cal.Rptr. 849, 374 P.2d 817], in both of which cases evidence obtained by clandestine observations of the occupants of a public rest room was held to have been obtained in violation of a right of privacy and, therefore, illegally obtained. Neither case is here in point. The controlling cases are *People v. Norton* (1962) 209 Cal.

App.2d 173 [25 Cal.Rptr. 676], and *People v. Young* (1963) 214 Cal.App.2d 131 [29 Cal.Rptr. 492], in both of which petitions for hearing by the Supereme Court were denied. In *Bielicki,* and in *Britt,* the defendant's activities were carried on in a place not open to public view. Here, as in *Norton,* and in *Young,* although the officer was hidden, the defendant's conduct was in a place open to view by anyone entering the room. As we recently said in *People v. Aguilar* (1965), *232 Cal.App.2d ....., ... [42 Cal.Rptr. 666]: "If a defendant conducts his activities under circumstances indicating an indifference to public observation, he cannot object if the observer is a policeman."

II

The information charged a violation of section 288a, couched in the language of that section. After the court had announced its finding of guilty as charged, a motion for a new, trial was made and denied. Defendant's counsel urged the court to reconsider and reduce the offense to that of a violation of section 650½ (an offense not within the registration provisions of section 290 of the Penal Code). After discussion, the court made an order setting aside its order denying a new trial, entertained a renewed motion and, in ruling on this second motion, the court reduced the offense to a violation of subdivision (a) of section 647 and then denied the motion for a new trial for the offense as so modified.

Preliminarily, the Attorney General argues that the trial court, having once denied a motion for a new trial,

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*Advance Report Citation: 232 A.C.A. 237, 241.

was without jurisdiction to vacate that order and entertain a new motion.[2] In support of this contention, he cites a footnote in *In re Levi* (1952) 39 Cal.2d 41, 45 [244 P.2d 403], and the case of *People v. Paysen* (1932) 123 Cal.App. 396 [11 P.2d 431]. Neither case is in point. In both, the new trial proceedings had been completed and a substantial period of time had elapsed before, at a different session of the court on a different day, there was any attempt to renew the motion. But here the order denying the new trial motion had not yet been entered in the minutes, nor had any subsequent proceeding in the case begun.

Where sentence has been pronounced, the trial court has authority to vacate it and to enter a different sentence at any time before the sentence is entered in the minutes or the execution of the sentence has begun. (*People v. Thomas* (1959) 52 Cal.2d 521 [342 P.2d 889].) We see no reason why an order denying a new trial should be any more sacrosanct. If the possibility of error, or of an unwise use of discretion, is suggested to the trial court, before its order has become fixed either by clerical entry or by subsequent official action

[2]The Attorney General also argues that the second motion was improperly granted because counsel did not, at that time, expressly state his grounds. However, the first motion was based on a ground—insufficiency of evidence—which is one of the grounds provided in section 1181 of the Penal Code; everyone involved regarded the motion, as previously made, to be renewed. In ruling on a motion on that ground, the court has statutory power to reduce the offense. (Pen. Code, § 1181, subdivision 6). In the discussion, both the deputy district attorney, defense counsel and the court, commented on the fact that, since defendant and his associate had been observed for a matter of seconds only, the evidence of a completed offense was weak. Whether the trial court was actually motivated by a doubt as to the sufficiency of the evidence or by feelings of leniency, it is clear that defense counsel adequately brought his request within the technical boundaries of section 1181.

based on the order, the trial court should, and we are convinced does, have the power to reexamine its ruling.

We agree with defendant that a violation of section 647, subdivision (a), is not a "lesser and necessarily included" offense within section 288a. The basic test has been stated as follows: "Where the offense charged cannot be accomplished without in the process committing the lesser offense, that lessor offense is a necessarily included offense. And, conversely, if the two offenses so differ in their elements that the offense charged can be committed independently of the lesser offense, a verdict of guilty of the lesser offense is unauthorized and void." (Witkin, Cal. Criminal Procedure (1963) § 542, p. 553.)

Since subdivision (a) of section 647 can be violated only by conduct in "any public place or in any place open to the public or exposed to public view," whereas the offense denounced by section 288a can be committed in any place, public or private, it necessarily follows that no "necessarily included" offense was present.[3]

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[3]The two sections read as follows:

Section 288a: "Any persons participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year; provided, however, whenever any person is found guilty of the offense specified herein, and it is charged and admitted or found to be true that he is more than 10 years older than his coparticipant in such an act, which coparticipant is under the age of 14, or that he has compelled the other's participation in such an act by force, violence, duress, menace, or threat of great bodily harm, he shall be punished by imprisonment in the state prison for not less than three years. The order of commitment shall expressly state whether a person convicted hereunder is more than 10 years older than his coparticipant and whether such coparticipant is under the age of 14. The order shall also state whether a person convicted hereunder has compelled coparticipation in his

However, the basic test as above stated is subject to certain exceptions:

(1) If the indictment or information, as drawn and on which a defendant was arraigned, contains allegations not necessary for a pleading of the major offense but which interject, as additional allegations, sufficient facts so that the elements of the "lesser" offense are fully set out, then a verdict or finding of guilt of the "lesser" offense is valid. (*People v. Marshall* (1957) 48 Cal.2d 394 [309 P.2d 456].)

(2) Where there is but a single offense, but that offense carries different consequences depending on the manner of its commission, the formal pleading may be aided by the testimony porduced at the preliminary examination—the testimony and the formal pleading, together, adequately advising the defendant of the case he will be expected to meet at the trial. (*People v. Collins* (1960) 54 Cal.2d 57 [4 Cal. Rptr. 158, 351 P.2d 326].)

In *People v. Leech* (1965)* 232 Cal.App.2d — [42 Cal. Rptr. 745], a judgment of conviction, based on a jury verdict of guilty of a violation of section 417 of the Penal Code, was reversed because the information had charged a violation of section 245 and we concluded that the offense denounced by section 417 was not a necessarily included offense within that denounced by section 245. However, in *Leech,* the trial court had submitted the case to the jury under both section 245

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act by force, violence, duress, menace, or threat of great bodily harm."

Section 647: "Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:

"(a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

*Advance Report Citation: 232 A.C.A. 489.

and section 417. There is nothing in the record of that case to indicate that the defendant had requested, or had consented to, the submission of any offense other than the single offense (a violation of section 245) which was pleaded. By virtue of sections 1176 and 1259 of the Penal Code, this action of the trial court, not having been invited or acquiesced in by defendant, was before the appellate court for review. But in the case at bench, the case had been heard by the trial court without a jury; the interjection of section 647, subdivision (a) was part of a running discussion between court and counsel, designed to arrive at a just determination of a particular case on its own particular facts. Clearly, with the consent of defendant, the information could, at that juncture, have been amended to add, as an additional count, a charge of violating subdivision (a) of section 647. Defendant had, earlier, expressly asked the court to "reduce" his offense to a violation of section 650½, and thereby impliedly consented that the information be treated as though that offense had been charged and pled to. But, insofar as section 650½ could be applicable to defendant, it also introduced the element of publicity.[4] Having, thus, himself, tendered to the court for action an offense which charged him with "public" conduct, he cannot complain that the court, unwilling to go as far as he desired, adopted as the basis for its decision another statutory section which also added to the language of the information that same element of public conduct.

We conclude that the effect of the proceedings had in the trial court in this case was to accomplish an in-

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[4]Section 650½: "A person who wilfully and wrongfully commits any act which . . . open outrages public decency. . . ."

formal amendment of the information to include a charge which was supported by the evidence although not by the original information; and that defendant knowingly allowed the case to proceed to judgment on the information as thus amended. Having, by this method, secured an acquittal of the original charge, defendant may not now repudiate the proceedings in which he participated.

The judgment is modified by deleting therefrom the reference to "Section 647a, Penal Code," and substituting therefor "subdivision (a) of Section 647, Penal Code"; the order appealed from is affirmed.

Files, P. J., and Jefferson, J., concurred.

Order Denying Hearing After Judgment by District Court of Appeal.

2nd District, Division 4, Crim. No. 9582

Order Due June 25, 1965.

In the Supreme Court of the State of California, in Bank.

People v. Hensel.

Filed Jun. 23, 1965.

Appellant's petition for hearing DENIED.

Tobiner
Acting Chief Justice